

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

RECEIVED

JAN 17 1995

In the Matter of

TELEPHONE COMPANY - CABLE
TELEVISION Cross-Ownership Rules,
Sections 63.54 - 63.58

and

Amendments of Parts 32, 36, 61, 64, and 69
of the Commission's Rules to Establish and
Implement Regulatory Procedures for Video
Dialtone Service

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

CC Docket No. 87-266

RM-8221

DOCKET FILE COPY ORIGINAL

**POLE ATTACHMENT REPLY COMMENTS
OF
CONTINENTAL CABLEVISION, INC., ET AL.**

Continental Cablevision, Inc. ("Continental"), Jones Intercable, Inc., Western Communications, Inc., Greater Media, Inc., Adelphia Cable Communications, Charter Communications Group, Prime Cable of Chicago, Inc., and the cable operator members of the Texas Cable TV Association, Cable Television Association of New York, Inc., and the Florida Cable Television Association (collectively "Pole Licensees") respectfully submit these Pole Attachment Reply Comments in the captioned proceeding.¹

¹See Telephone Company-Cable Television Cross Ownership Rules and Amendments of the Commission's Rules to Establish and Implement Regulatory Procedures for Video Dialtone Service, Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rulemaking, CC Docket No. 87-266, RM-8221 (FCC 94-269) ¶ 285 (Released Nov. 7, 1994) ("Third Further Notice"). Continental and the other Pole Licensees, moreover, support the Video Dialtone Comments ("Joint VDT Comments") and Joint Video Dialtone Reply Comments filed in this proceeding by the Atlantic Cable Coalition, Georgia Cable Television Association, Great Lakes Cable Coalition, Minnesota

024

Utilities, especially those seeking now or in the near future to provide video dialtone service, have escalated pole attachment abuses to unprecedented levels, at the expense of the cable industry, competition and consumer choice. With the advent of direct competition between the cable and telephone industries, LECs' conduct has proven beyond doubt that there exist *critical* links between pole attachments, video dialtone and facilities-based broadband competition. Now that the Commission appears to be willing to allow LECs themselves to provide video programming over their own VDT networks,² LEC incentives to act anticompetitively continue to increase, requiring compensating pole attachment-related protections.

The Commission, in addition to recognizing in this proceeding the need for pole attachment safeguards,³ however, recently issued a stern warning that it will "ensur[e] that the growth and development of cable television facilities is not hindered by unreasonable conduct on the part of utility pole owners."⁴ The most efficient and effective way for the Commission to accomplish this end in the VDT context is to adopt the safeguards proposed by Continental and the other Pole Licensees set forth in their Pole Attachment comments.

There is good reason for Commission concern. In order to stop cable's installation of fiber or provision of non-entertainment services, LECs have reverted to the

Association, and the Tennessee Cable Television Association. The Texas Cable TV Association, in addition to joining in these Pole Attachment Comments, is a Joint Commenter in the referenced VDT Comments.

²See Common Carrier Action, Rep. No. CC95-6 (Jan. 12, 1995)(Bell Atlantic authorized to provide video programming services over its VDT network in Arlington, Virginia).

³id.

⁴Public Notice, DA-95-35 (Jan. 11, 1995).

historical pattern of attempting to deny to cable operators access to essential pole and conduit facilities by, among other measures, seeking police arrest of cable workers attempting to install fiber optic attachments,⁵ requiring advance approval for overlash installation of fiber optic, but *not* coaxial conductors,⁶ in violation of federal law,⁷ rescinding already-granted permit approval,⁸ as well as continuing to inflict chronic permit and makeready stonewalling, in some cases delaying permitting and makeready work for several years.⁹ These revived efforts to deny access have been accompanied by punitive pole attachment and conduit occupancy rate increases, in one case as high as 550% above the rates previously charged.¹⁰

The LECs' mantra in this proceeding that additional pole attachment safeguards for VDT providers are not required was as predictable as it is wrong.¹¹ Only the LECs have claimed that existing pole attachment safeguards are adequate and that additional safeguards are unnecessary. By contrast, an extraordinarily diverse coalition of other interests commenting on pole attachments, ranging from the City of New York and the National Association of

⁵Pole Attachment Comments at 21.

⁶*Id.* at 21, 26.

⁷See, e.g., Heritage Cablevision Assocs. of Dallas, L.P. et al. v. Texas Utils. Elec. Co., 6 FCC Rcd. 7099 (1991), recon. dismissed, 7 FCC Rcd. 4192 (1992), aff'd, Texas Utils. Elec. Co. v. FCC, 997 F.2d 925 (D.C. Cir. 1993).

⁸Pole Attachment Comments at 26.

⁹*Id.* at 25-28.

¹⁰*Id.* at 25.

¹¹See Comments of Ameritech at 9-10; Comments of Bell Atlantic at 13-14; Comments of Bell South at 9-10; Comments of GTE at 18-19; Comments of NYNEX at 17-18; Comments of U S West at 29-30.

Telecommunications Officers and Advisors,¹² to AT&T¹³, the District of Columbia Public Service Commission,¹⁴ United and Central Telephone Companies,¹⁵ and the cable television industry,¹⁶ agree with the Commission, and Continental and the other Pole Licensees, that additional pole attachment safeguards in the video dialtone context are necessary.

While all pole-related Comments offered by the LECs conclusorily state that existing safeguards are sufficient (thereby conceding that the Pole Act¹⁷ and related

¹²See Comments of National Association of Telecommunications Officers and Advisors ("NATOA") and the City of New York at 18-20 (New York City and other local governments support a rule prohibiting LECs from denying competitors access, but such a rule should not preempt state and local laws and regulations governing electrical systems on poles and in conduits).

¹³See Comments of AT&T at 10-12 (LECs either should transfer control of conduits, pole facilities and rights of way and other pathways to a disinterested third party that would make the facilities generally available on non-discriminatory terms, or, the Commission should require that LECs provide to unaffiliated entities access to poles, conduits and rights of way and other pathways under identical terms and conditions under which the LEC provides access to itself).

¹⁴See Comments of District of Columbia Public Service Commission at 3-4 (additional safeguards are necessary).

¹⁵See Comments of the United and Central Telephone Companies at 8-9 (dominant LEC's should not be permitted to offer video dialtone services if they hinder competition through domination of essential facilities, and rule text proposed requiring dominant LEC to show that pole attachment rights to cable have been granted).

¹⁶See Joint Pole Attachment Comments of Continental Cablevision *et al.*; see also Comments of National Cable Television Association at 32-34; New England Cable Television Association at 14-20; Comments of the Joint Parties (Adelphia Communications Corp.; Comcast Cable Communications, Inc.; Cox Enterprises, Inc.; and Jones Intercable, Inc.) at 10-11.

¹⁷47 U.S.C. § 224.

Commission regulations¹⁸ are necessary to prevent utility abuses), the Comments of U S West require specific reply. U S West claims that:

[t]he connection between a "facilities based programmer" and a U S West based video dialtone platform would necessarily be a high capacity circuit. These circuits do not utilize telephone poles. Moreover, high capacity transport providers are flourishing today without any pole or conduit rules by the Commission. Frankly such space does not constitute an essential facility under any relevant economic doctrine and there is no need for a conduit rule to protect facilities based video programmers. In other words, LECs have no realistic ability to prevent, or significantly impede, development of competition by facilities-based programmers.¹⁹

Notwithstanding the other inaccuracies contained in this passage, U S West's assertion that pole and conduit space do not constitute essential facilities misstates the law, contradicting more than twenty years of Commission²⁰ and federal judicial precedent,²¹ including Supreme Court

¹⁸47 C.F.R. §§ 1.1401-1.1415.

¹⁹U S West Comments at 29-30 (emphasis in original).

²⁰Public Notice, DA 95-35 (Jan. 11, 1995) ("[u]tility poles, ducts, and conduits are regarded as essential facilities, access to which is vital for promoting the deployment of cable television systems."); see, also, Twixtel Technologies, Letter from FCC Common Carrier Bureau, July 6, 1990 at 4 (basis of telco-cable crossownership rule is "the Commission's traditional concerns with carrier denial of access to essential poles and conduit"); Section 214 Certificates, 21 F.C.C.2d 307, 323-29 (1970) (CATV systems "have to rely on the telephone companies for either construction and lease of channel facilities or for the use of poles for the construction of their own facilities." Telco has monopoly and "effective control of the pole lines (or conduit space) required for the construction and operation of CATV systems"); General Tel. Co. of California, 13 F.C.C.2d 448, 463 (1968) (by control over poles, Telco is in a position to preclude an unaffiliated CATV system from commencing service).

²¹See, e.g., United States v. Western Elec., 673 F. Supp. 525, 564 (D.D.C. 1987) (cable TV companies "do depend on permission from the Regional Companies for attachment of their cables to the telephone companies' poles and the sharing of their conduit space. . . . In short, there does not exist any meaningful, large-scale alternative to the facilities of the local exchange networks. . . ."); General Telephone Co. of Southwest v. United States, 449 F.2d 846, 851 (5th Cir. 1971) (construction of systems outside of utility poles and ducts is "generally unfeasible").

precedent,²² and explicit congressional findings,²³ and is typical of the lengths to which LECs will go to stunt facilities-based competition. Rather than having "no realistic ability" to thwart cable and other facilities-based programmers as U S West claims, when LECs, like U S West, have both the incentive (to secure advantage for their VDT systems) and ability (through denial of access, manipulation of rates and other abusive practices made possible by their monopoly control of essential pole and conduit space), they do.

The old order is changing. The current pole attachment protections were designed for a world where direct competition between telephone companies and cable television operators was prohibited. Now the Commission, through its resolve to bring competition to video services through video dialtone, and the courts, by striking the cable/telco

²²See, e.g., F.C.C. v. Florida Power Corp., 480 U.S. 245, 247 (1987) ("In most instances underground installation of the necessary cables is impossible or impracticable. Utility company poles provide, under such circumstances, virtually the only practical physical medium for the installation of television cables").

²³See, e.g., 123 Cong. Rec. 35006 (1977) (remarks of Rep. Wirth, sponsor of Pole Attachment Law) ("The cable television industry has traditionally relied on telephone and power companies to provide space on poles for the attachment of CATV cables. Primarily because of environmental concerns, local governments have prohibited cable operators from constructing their own poles. Accordingly, cable operators are virtually dependent on the telephone and power companies. . . ."); 123 Cong. Rec. 16697 (1977) (remarks of Rep. Wirth) ("Cable television operators are generally prohibited by local governments from constructing their own poles to bring cable service to consumers. This means they must rely on the excess space on poles owned by the power and telephone utilities."); S. Rep. No. 580, 95th Cong., 1st Sess. 13 (1977) ("Owing to a variety of factors, including environmental or zoning restrictions and the costs of erecting separate CATV poles or entrenching CATV cables underground, there is often no practical alternative to a CATV system operator except to utilize available space on existing poles."); H.R. Rep. No. 721 95th Cong., 1st Sess. 2 (1977) ("Use is made of existing poles rather than newly placed poles due to the reluctance of most communities, based on environmental considerations, to allow an additional duplicate set of poles to be placed").

cross ownership ban,²⁴ have revolutionized the fundamental structure of the video services industry. Rather than being prohibited from offering video services, the Commission and the Courts have opened the floodgates of competition. But the LECs, and only the LECs, are claiming that existing pole attachment protections are adequate when they clearly are not. The existing pole attachment safeguards are not protecting cable operators and competition from VDT-related pole and conduit abuses. The new order of direct competition requires the additional concrete safeguards that Continental and the other Pole Licensees have set forth in their Pole Attachment Comments.

The Commission has recognized in this proceeding, and in its January 11 Public Notice, the importance of pole attachments in the competition between the cable and telephone industries. The existing channel leasing rules, on which the Commission's proposal is modelled, basically require a channel lessee to certify that it was offered the option of building its own system. This measure fails to address the core problem. Those rules provide no protection to cable operators or any other facilities-based carriers in a VDT environment because the VDT channel lessees (which the Commission has suggested may be the LECs' video services subsidiary) are not going to complain about LEC-imposed discriminatory treatment against cable competitors. Likewise, existing pole attachment protections, which were designed to provide for expeditious resolution of pole attachment disputes²⁵ (where cable and telephone companies were not in direct and immediate competition) are inadequate. Rate

²⁴See, e.g., Pacific Telesis Group v. United States of America, No. 94-16064 (9th Cir. Dec. 30, 1994); Chesapeake and Potomac Tel. Co. of Va. v. United States of America, et al., Nos. 93-2340 and 93-2341 (4th Cir. Nov. 21, 1994).

²⁵See S. Rep. No. 580, 95th Cong., 1st Sess. 21 (1978).

increases and other abuses lie unremedied at the Commission at this most critical time of competition and infrastructure development in the broadband services industry. The arrival of VDT only will increase the number and severity of pole attachment abuses at a time when pole attachment disputes *must* be resolved quickly so that true competition and maximum consumer choice is made available.

The solutions that Continental and the other Pole Licenses have proffered in the Pole Attachment Comments address this critical need to protect competition between the telephone and cable television industries.

Specifically, and as set forth in greater detail in the Pole Attachment Comments, the Commission should (a) adopt video dialtone-specific regulations prohibiting LECs from engaging in anti-competitive conduct against cable operators, including distinguishing between video and non-video transmissions, and coaxial and fiber optic conductors (making grant of all applications, amendments, and fulfillment of the tariffing process contingent on LECs' not engaging in such conduct), and (b) amend the pole attachment rules to require video dialtone operators to obtain advance approval of any pole or conduit rate increase, and, provide for expedited pole complaint proceedings for pole actions against video dialtone operators. The Commission, moreover, should ensure that cable operators receive from LECs identical rights of access to poles and conduits that such LECs provide to their own VDT operations.

These safeguards will assure the prompt construction of both cable's and the LECs' broadband networks. VDT providers acting reasonably toward cable operators will witness their applications, amendments and tariffs sail through the approval process unhindered by pole and conduit related submissions filed by cable operators. Cable operators, facing such


reasonable conduct by VDT providers, in turn, will receive (1) prompt permit and makeready approval, (2) no LEC discrimination between fiber and coaxial attachments or entertainment and non-entertainment services, and, (3) reasonable rates. And consumers, ultimately, will benefit from the choice between two competing video service providers.

Utility abuse of essential pole and conduit space has prompted the Commission to warn utility pole owners against abusive practices over their essential pole and conduit facilities and invite "[p]arties who believe that their rights . . . have been infringed . . . to bring the matter to the attention of the Commission or state regulatory authorities that have asserted jurisdiction over these facilities."²⁶ The Commission should heed the comments of all non-LEC interests submitting views on pole attachments in this proceeding, and adopt the rules proposed by Continental and the other Pole Licensees. Inherently, pole owners always will operate from a stronger position than pole licensees, but the rules of the game can be made fairer by adopting Continental's and the other Pole Licensees' proposals. It is far easier, and far better public policy, to grade a level playing field between these two industries now, rather than to try to correct, several years from now, competitive damage unwittingly fostered by insufficient regulatory measures.

²⁶Public Notice, DA 95-35 (Jan. 11, 1995).

For the foregoing reasons, and those set forth in the Pole Attachment Comments, the Commission should adopt the video dialtone-specific pole attachment safeguards proposed by Continental and the other Pole Licensees, as well as the additional requirement that VDT applicants/grantees provide pole and conduit access rights to cable operators identical to the access rights accorded by LECs to their own video dialtone operations.

Respectfully submitted,

By: 
Paul Glist
John Davidson Thomas
COLE, RAYWID & BRAVERMAN, L.L.P.
1919 Pennsylvania Avenue, N.W.
Suite 200
Washington, D.C. 20006
(202) 659-9750

Attorneys For

Continental Cablevision, Inc.
Greater Media, Inc.
Jones Intercable, Inc.
Western Communications, Inc.
Adelphia Cable Communications
Charter Communications Group
Community Cable TV
Prime Cable of Chicago, Inc.

The Florida Cable Television Association
The Cable Television Association of New York, Inc.
The Texas Cable TV Association

January 17, 1995

CERTIFICATE OF SERVICE

I, Elizabeth Johnson do hereby certify that on this 17th day of January 1995, I have caused a copy of the foregoing to be served via first-class United States Mail, postage pre-paid, upon the persons listed on the attached service list.

*Commissioner Rachelle B. Chong
Federal Communications Commission, Rm. 844
1919 M Street, N.W.
Washington, DC 20554

*Chairman Reed E. Hundt
Federal Communications Commission, Rm. 814
1919 M Street, N.W.
Washington, DC 20554

*Commissioner Susan P. Ness
Federal Communications Commission, Rm. 832
1919 M Street, N.W.
Washington, DC 20554

*Commissioner Andrew C. Barrett
Federal Communications Commission, Rm. 826
1919 M Street, N.W.
Washington, DC 20554

*Commissioner James H. Quello
Federal Communications Commission, Rm. 802
1919 M Street, N.W.
Washington, DC 20554

*Kathleen M.L. Wallman
Federal Communications Commission, 9th Floor
2033 M Street, N.W.
Washington, DC 20554

*Donna Lampert
Federal Communications Commission, Rm. 554
1919 M Street, N.W.
Washington, DC 20554

*David Krech
Federal Communications Commission, Rm 500
1919 M Street, N.W.
Washington, DC 20554

***William E. Kennard**
Federal Communications Commission, Rm 614
1919 M Street, N.W.
Washington, DC 20554

***James D. Schlichting**
Federal Communications Commission, Rm. 544
1919 M Street, N.W.
Washington, DC 20554

***Rudolfo M. Baca**
Federal Communications Commission, Rm. 802
1919 M Street, N.W.
Washington, DC 20554

***James R. Keegan**
Federal Communications Commission, Rm. 6008
2025 M Street, N.W.
Washington, DC 20036

***John L. Walker**
Federal Communications Commission, Rm. 6008
2025 M Street, N.W.
Washington, DC 20036

***Karen Brinkmann**
Federal Communications Commission, Rm. 814
1919 M Street, N.W.
Washington, DC 20554

***Olga Madruga-Forti**
Federal Communications Commission, Rm. 6008
2025 M Street, N.W.
Washington, DC 20036

***James R. Coltharp**
Federal Communications Commission, Rm. 826
1919 M Street, N.W.
Washington, DC 20554

***John Morabito**
Federal Communications Commission, Rm. 544
1919 M Street, N.W.
Washington, DC 20554

***A. Richard Metzger, Jr.**
Federal Communications Commission, Rm. 500
1919 M Street, N.W.
Washington, DC 20554

***Lauren J. Belvin**
Federal Communications Commission, Rm. 806
1919 M Street, N.W.
Washington, DC 20554

***Rosalee Chiara**
Federal Communications Commission, Rm. 6114
2025 M Street, N.W.
Washington, DC 20554

***Carol Matthey**
Federal Communications Commission, Rm. 544
1919 M Street, N.W.
Washington, DC 20554

***Robert M. Pepper**
Federal Communications Commission, Rm. 822
1919 M Street, N.W.
Washington, DC 20554

***Richard K. Welch**
Federal Communications Commission, Rm. 844
1919 M Street, N.W.
Washington, DC 20554

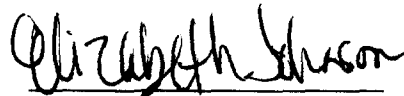
***James L. Casserly**
Federal Communications Commission, Rm. 832
1919 M Street, N.W.
Washington, DC 20554

***International Transcription Services, Inc.**
Suite 140
2100 M Street, N.W.
Washington, DC 20037

***Michael Katz**
Federal Communications Commission, Rm. 822
1919 M Street, N.W.
Washington, DC 20554

***Ruth Milkman**
Federal Communications Commission, Rm. 814
1919 M Street, N.W.
Washington, DC 20554

***Kathleen B. Levitz**
Federal Communications Commission, Rm. 500
1919 M Street, N.W.
Washington, DC 20554


Elizabeth Johnson

*** hand delivered**